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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
Ivan W. Smith, Chairman
Dr. Walter H. Jordan
Dr. Linda W. Little

SERVED MAY 6 1982

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY	)	Docket No. 50-289
	)	
(Three Mile Island Nuclear Station, Unit No. 1)	)	(Restart) (Reopened Proceeding)

May 5, 1982

MEMORANDUM AND ORDER REGARDING
LICENSEE'S MOTION TO REOPEN THE RECORD

The Special Master's Report on the reopened proceeding on cheating was rendered by Judge Milhollin on April 28, 1982. He found that the TMI-1 Manager of Operations, Michael Ross, had intentionally frustrated proctoring during the April 1981 NRC licensing examinations and that Mr. Ross had in bad faith expanded the respective answer keys to provide an unfair advantage to the candidates. Report at ¶¶ 136-183. By motion of April 30 the Licensee requested that the record be reopened so that the Board itself may hear Mr. Ross' testimony. Licensee also moves that we defer receiving comments on the report from May 13 as presently scheduled until at least May 28, or until after any reopened session.

On May 3, 1982 a quorum of the Board conducted a telephone conference call among representatives for the participants in the reopened proceeding, the Aamodt Family, Three Mile Island Alert (TMIA), the Commonwealth of Pennsylvania, the NRC Staff and the Licensee. We explained to the

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participants that, from the outset, the Board has been aware of the important allegations against Mr. Ross and that each member closely followed this aspect of the proceeding. After examining the pertinent evidentiary record, the Board independently arrived at tentative conclusions on the issues. Judge Milhollin had provided the Board with advance copies of that portion of his report relating to the Ross issues, which we have already analyzed. We informed the parties that as of now, pending their comments, our view is that we would disagree with the Special Master's conclusions respecting Mr. Ross. Only the Licensee and the NRC Staff had filed proposed findings on the issues, and no party urged to Judge Milhollin a finding against Mr. Ross. Therefor the Board already had begun to draft a tentative decision on the Ross issues.

We also noted that the Licensee has made a persuasive argument for reopening the record to hear Mr. Ross' version of the events underlying Judge Milhollin's findings, but that, in view of our own tentative conclusions, that step may not be necessary. We proposed instead that the Board serve for comment the tentative final draft of the relevant portion of its forthcoming initial decision. No party objected.

After receiving a brief explanation of some of the findings and conclusions in the proposed tentative final draft, counsel for the Licensee withdrew without prejudice the motion to reopen. Even though they had not filed proposed findings with the Special Master on the Ross

issues, THIA, Mr. Aamodt and counsel for the Commonwealth expressed interest in the issues and the Board clarified that their (timely and appropriate) comments would be considered.*/ All participants except the NRC Staff joined in a request for an extension of the comment period. The Staff did not oppose the request.

Accordingly attached hereto is a tentative final draft of that portion of the forthcoming initial decision in the proceeding pertaining to the allegations against Mr. Ross. Dr. Jordan contributed to this draft, and is familiar with the analyses and conclusions. He has not, however, read the attached version verbatim. He concurs in this action. The attached version is subject to editorial and substantive changes on the Board's initiative, and, of course, the comments of the parties may influence the final result.

The time for initial comments on the Special Master's Report is extended to May 19, at which time the comments shall be in the hands of the participating parties and the Board. Sending the comments by express over-night service timely on May 18 is acceptable. Service on the Board (4 copies) may be made to the Chairman at the Holiday Inn, Springtown Boulevard, Livermore, California 94550. Reply comments shall be in the hands of the participants and the Board on May 25.

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*/ The Board is not inclined to regard the failure to file proposed findings before the Special Master as a default on the respective Ross issues before us. Normally we would not afford much weight to the advocacy of a position before the Board when it was not made before the Special Master. It is apparent, however, that there was insufficient focus on the Ross issues during the hearing.

In related consideration, counsel for O, W, and VV have requested that they be served with the parties' comments and other pertinent documents. This should be done with service upon:

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The Board recognizes the standing of O, W, VV and any Licensee employee referred to in the Special Master's Report to comment and we direct the Licensee to inform them promptly of this right. Counsel for O, W and VV have been advised of their standing.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Linda W. Little by IWS
Linda W. Little
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
Ivan W. Smith
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland

May 5, 1982

TENTATIVE FINAL DRAFT FOR PARTY COMMENT

MAY 5, 1982

Keeping the Proctor Away From the Examination Room

(Report at ¶¶ 137-52)

Broadening the Answer Keys

(Report at ¶¶ 153-78)

Michael J. Ross, Manager of Plant Operations, reviews and schedules all operations and directs the activities of about 110 operating personnel consisting of the shift operating staff, the radwaste group and several operations engineers. We commented in the "management" PID that he may be the most important person of the TMI-1 operating team with respect to public health and safety. He had testified before the Board five times over many days on a wide variety of design, procedures

and operator training issues. As we noted in the partial initial decision, we were favorably impressed by his testimony. August 27 PID ¶ 155, 14 NRC at 416, 439-41. The allegations against him have the most serious implications of the entire inquiry on cheating.

It is an established practice that NRC operator licensing examiners go over the test questions and proposed answer keys with knowledgeable utility officials soon after the examinations are underway so that the validity of the questions and answers to a particular plant may be ascertained. To preserve the integrity of the exam this is not done before the examination, but it must be done soon after it begins to afford a timely opportunity to modify questions to be plant specific. As might be expected, the company representative reviewing the NRC examination normally would not be a license candidate.

On April 23 and 24, 1981, Mr. Ross, and two licensed company training officials, Messrs. Boltz and Brown, were called upon by NRC examiner Wilson to review with him the questions then being presented in the "B" examinations and the answer keys to both the "A" and "B" sets. Unfortunately an unusual situation prevailed then at TMI in that all licensed officials were required by Commission order to be re-licensed. Mr. Ross, the most knowledgeable company official, and his two colleagues had just taken the "A" set of examinations during the preceding two days, but were the best qualified to evaluate the answer keys to both the "A" and "B" sets and the questions for the "B" set. They had not, of course, seen the "A" set questions or answer key before they took that exam

This was not a situation of Mr. Ross' making; no one asserts that he sought out the opportunity or that he should not have rendered any assistance to Mr. Wilson. No accusations have been made directly against Messrs. Boltz and Brown. In this instance however, the procedure meant that the three company officials had an interested voice in the formation of the questions and answer keys and it meant that the examiner, while reviewing the test material with them, was not able to attend to his proctoring responsibilities. Thus a plausible background exists for the very grave allegations made against Mr. Ross by his sole accuser, YY.

YY was formerly employed at TMI-1 as a part of the operating shift during a period which embraced the April 1981 NRC exams. In September 1981 he reported to the NRC inspectors and later testified that Mr. Ross implied that he, Ross, had deliberately distracted the NRC examiner so that the candidates could cheat, and that Mr. Ross had convinced the NRC examiner to expand improperly the answer keys so that scoring would be unfairly liberal. YY also stated that Mr. Ross is the type of person who would purposely do such a thing. Without YY's testimony there would be very little direct evidence against Mr. Ross, particularly with respect to the proctoring allegation, but Judge Milhollin's analysis includes his findings relative to other circumstances surrounding the episodes. He concludes that Mr. Ross did act to prevent proctoring and that Ross in bad faith brought about an expansion of the answer keys. We disagree with both conclusions.

In our evaluation of the evidentiary record below we find Mr. Ross' denial more credible than YY's accusations, and that the overall evidentiary record favors Mr. Ross.

The basic allegation against Mr. Ross is founded on YY's inference drawn from a statement attributed by him to Ross. According to YY, Ross said that he, Ross:

> had gotten the NRC to expand the answer keys so as to give the examinees more latitude in their answers and also that he had kept the proctor out of the room for a very long period of time. The inference I [YY] drew was that by both actions he made it easier for the people taking the test.

YY's statement to NRC, Staff Ex. 27, Enclosure 1.

The statement even as recalled by YY is equivocal. It is subject to a completely benign inference in that it could mean that Mr. Ross influenced the NRC to accurately expand the answer keys to fairly provide more latitude and that this process took a very long time. As equivocal as the statement is, YY equivocated even more in explaining the conversation from which the statement derived. He explained to the NRC investigators that while he believed that Ross had admitted deliberately facilitating cheating, it was also "possible that he could have been bragging." Id. It is clear from a review of YY's statements and the later testimony that when he and others use the term "bragging", or such, they are referring to untruthful bragging.

At the hearing YY testified that while he does not regard Ross' alleged incriminating statement as untruthful bragging, others might have regarded the statement as untrue. He testified that he had therefore clarified his statement to state also that Ross "could have been bragging." Tr. 26,015-16.

Also in his testimony YY repeated his general allegation that he believed Mr. Ross would have and did act deliberately to facilitate cheating. Tr. 26,011, 26,015-16. However in other portions of his testimony he seems to state that any unfair advantage to the test candidates was an incidental result of normal procedures. He stated:

> Q . . . . Do you have any first-hand knowledge of Mr. Ross expanding the answer key to any NRC exam in order to give the examinees an unfair advantage in passing the exam?
>
> A In my statement I said and I still feel that Mr. Ross expanded the answer key under normal procedures. It was explained to me that that is a normal procedure, but I fee he also expanded the answer key and in doing that act of expansion he was able to facilitate keeping the proctor from the room for a long period of time; and that keeping the proctor from the room I understand is a normal thing, but feel that since the proctor was out of the room, that the examinees might have had an unfair advantage which they would not have if the proctor was in the room all the time.

Tr. 26,022.

In his testimony YY also explained that he did not report the reputed conversation until some five months later. Tr. 26,024-25.

He stated that at the time he had been bothered because of the type of conversation, but that he had more or less become calloused by that type of conversation. Tr. 26,024. And, he further explained, the type of conversation to which he referred did not involve cheating, but bragging.[1] The clear meaning of YY's testimony is that, at the time the statement was made, he did not believe that Mr. Ross was admitting that he facilitated cheating.

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[1] "Q You said, I think, earlier that you had become I think you said callous towards conversations involving cheating. Is that correct or is that not correct?

"A No, that is not correct. My statement was that I had become calloused to certain types of conversation in the shift supervisor's office, and I think that statement was referring to the bragging that Mr. Ross did or the conversations that he had, the type of conversations that he had. He was a big talker." Tr. 26,030.

It was not until YY learned that O and W were fired for cheating, five months later, that YY may have decided that Ross had admitted to improper actions. Tr. 26,024-25. Moreover it is significant that when at last YY's perception of Ross' meaning changed to its present version, he had just learned that O and W were, in his view, unfairly treated by Met Ed management (Tr. 26,018; 26,025).

In sum: YY heard Mr. Ross make a statement, which even according to YY's recounting of it, as cited above (¶ ____), was hardly an admission of misconduct. Any sinister meaning depended upon YY's interpretation. Giving YY's testimony the greatest force, YY believed that Ross' statement truthfully implied cheating but that others could reasonably have inferred untruthful bragging. Giving YY's statement the

proper force, even he did not think the reputed statement was an admission of cheating when made. He possibly came to that opinion five months later. Then his perception of the statement was influenced by the news that two of his former co-workers were in his view unfairly fired. Even then, it is not clear from his testimony, one way or the other, whether YY finally believed that Mr. Ross deliberately facilitated cheating. YY's allegations were probably honestly made; there is no evidence strong enough to indicate malice. But his testimony and perceptions of the meaning of the conversation attributed to Ross are too subjective, internally contradictory, and unreliable to be accepted by the Board.

Others, GG, KK, and RR, recalled statements by Ross (which could have been the basis of YY's inferences), to the effect that the candidates were not to worry in that they did all right on the exam and that he, Ross, ". . . took care of that job". See Staff Ex. 27, at 24, 26-27; Report at ¶¶ 143-44. Those witnesses inferred from Ross' comments that he had fairly broadened the answer keys, and that, apparently by joking, he was seeking to cheer his crew. Id. This would have been a very understandable message from Ross to his crew after months of training and a week of examinations. It does not indicate to the Board a necessarily improper motive. The views of GG, KK and RR seem more reasonable to the Board than the inferences drawn by YY.

Mr. Ross denied that he deliberately hindered proctoring or that he improperly influenced the answer keys. He admitted however, that he could have made the statements remembered as benign by GG, KK, and RR, and which also could have been the remarks overheard by YY. Report at

¶¶ 144 and 145. His testimony was not straightforward enough to persuade Judge Milhollin. It is true that his testimony was uncertain on the matter. But it must be recalled that Mr. Ross had to defend himself against YY's accusations without even knowing who made the accusations or why he made them. YY testified after Mr. Ross testified.[1] To meet the charges completely, he had to postulate their bases. This is, of course, a due process consideration. But its immediate significance is that Mr. Ross' defense testimony must be measured in light of the fact that he has not been confronted with all the specifics of the accusations. Mr. Ross did however know the essence of the charges against him. He was provided an excised copy of YY's initial statement to the NRC. The statement was similar to his testimony.

Having found that YY's accusations are incredible, Mr. Ross' defense becomes less important. Nevertheless, there are other aspects to the issue which Judge Milhollin appropriately has evaluated. He commented that Mr. Ross has made some exculpatory statements which do not square with the record. For example, Mr. Ross minimized the amount of

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[1] While many company witnesses were assigned code letters to protect their identities from the public, they knew each other's actual identity even though sequestered as witnesses. In YY's case, however, the code letters were used to protect his identity from Licensee's personnel, including Mr. Ross. See Tr. 24,215; 24,217; 26,011-12. To this day, Mr. Ross may not know the full details of the charges against him or who made them.

changes on the answer keys due to his requests and the amount of time the review took. Report at ¶ 146. In explaining his asserted failure to recall the changes, Mr. Ross over-estimated the time from the changes to his testimony. We do not attribute these faulty recollections by Mr. Ross to a failure of candor. Each questioned point was precisely ascertainable, as he must have known. Faced with charges, true or not, there is a natural tendency for persons to recall events and to testify in a light favorable to their innocence.

However, we do not understand the basis for Mr. Ross' testimony that he has never learned whether the changes in the answer keys were adopted (Tr. 24,332) in light of the large number of changes actually made, and in light of the testimony that he informed the control room operators that such changes were fairly made. See Report at ¶¶ 146-48. Nor is his testimony persuasive that he did not know that one of the two examination rooms was unproctored during his review of the questions and answer keys with Mr. Wilson. Report at ¶ 149. From his perspective, Judge Milhollin may have been justified in finding that Mr. Ross' testimony on these specifics was incredible. The Board however is not prepared to attribute this to untruthfulness. As we noted above, we observed Mr. Ross over many days during the main proceeding and we have our own views concerning his credibility. Within our experiences it is not an uncommon phenomenon for truthful and credible witnesses, perhaps because of the fallibility of human perceptions and memories, to render some unbelievable testimony. We have reviewed all of Mr. Ross' testimony and we attribute the questioned testimony to confusion or to other unknown but honorable reasons.

Considering the specific accusations against Mr. Ross, and considering the inherent opportunity to adversely affect the validity of the examinations made possible by company review of NRC answer keys, Judge Milhollin very commendably analyzed a sampling of the April 1981 NRC operator exam questions. Report at ¶¶ 153-78. From the "A" exams he selected eleven questions where answer-key changes were made at the suggestion of the company reviewers and one where an attempt to change the answer key was rejected by the NRC examiner.

As to nine of the examples Judge Milhollin correctly found that the changes were appropriately made in the direction of accuracy. As to one question, E.3 (the sixth analyzed by him), he found that the NRC examiner came to the exam with insufficient data. He therefore accepted answer data from the reviewers and an answer-key change. While Judge Milhollin does not question the change, he is unsettled by doubts about the accuracy of the supplied information. This question however is not used by Judge Milhollin as an example of improper efforts by Mr. Ross and the other company reviewers. Report at ¶ 169. We agree with this conclusion also.

One of the two remaining questions analyzed, Question B.5.a, covered the purpose of the No. 1 seal by-pass line. The answer must include how opening the line affects the seal. Report at ¶ 154. The company reviewers persuaded Mr. Wilson to drop his original answer key to the second part, i.e., opening the line ". . . prevents binding and contact of seal faces." At the urging of the reviewers, Mr. Wilson added

a bearing-cooling effect to the answer key. The examiner accepted the change because, in part, the reviewers argued that the training covered only the bearing-cooling effect and not the effect upon the seal faces. Judge Milhollin found that the change was improper, and should not have been accepted. We agree that the change was improper. As a result of the change, the three company reviewers and six other candidates received better scores than they deserved. Eight other candidates mention the seal faces, a fact which adequately supports Judge Milhollin's conclusion that the seal-face effect had also been covered in training contrary to the reported representations of the reviewers.

The remaining question sampled, Question C.7 b (the fourth analyzed by Judge Milhollin), noted that pH control is important to minimize corrosion of primary and secondary components and that primary pH can vary from 4.6 to 8.5. Candidates were directed to: "Describe the competing effects that determine primary pH and cause it to vary in this manner." Emphasis added. The answer key required as a part of the answer: "Boric acid and lithium hydroxide concentrations compete." Report at ¶ 161. The reviewers argued for a change which would permit reporting only the manner of controlling lithium hydroxide, but Mr. Wilson refused to change. The rejected change matched the answers given by Mr. Ross, another reviewer, Mr. Boltz, and three candidates. The majority of the candidates answered in accordance with the NRC answer key.

Judge Milhollin finds that Mr. Ross and Mr. Boltz improperly argued for the change. Report at ¶ 166. We agree that the proposed change was properly rejected but we cannot find that the attempt was unconscionable in view of the difference between the chemistry lecturer in training (the correct answer) and actual plant practice. It is clear however that the answer based upon actual plant practice would not respond literally to the question.

Mr. Ross' and his colleagues' successful effort to change the seal-face question (B.5.a) and their attempt to change the primary pH question (C.2.b) is the basis for Judge Milhollin's conclusion that they acted in bad faith. Report at ¶ 177. However, only Mr. Ross and the corporate Licensee is held culpable in Judge Milhollin's final conclusions. Report at ¶¶ 178, 322-24. The Board believes that Judge Milhollin placed too much significance on the two cited answer-key situations. The analysis must go beyond the inferences drawn from the possible benefits to Mr. Ross from the change or attempted change and the reasons said to have been given for the changes.

The central issue is whether the proposals were made in good faith; not whether they were correct. Neither Mr. Ross nor the other reviewer who testified, Mr. Brown, was questioned as to their reasons for the proposed changes, or whether Mr. Wilson's account of the episodes is accurate. Judge Milhollin relied upon Mr. Wilson's testimony on this

sub-issue. For analysis, however, we assume, arguendo, that Mr. Wilson accurately recounted the change proposals, and impute to Mr. Ross, as the senior official present, the responsibility for the proposals.

As to both examples, even though the changes did or could have benefited Mr. Ross, we may assume that when he very recently had given the respective answers on the examinations, he believed they were correct and adequate. He would be in good faith in arguing for the changes unless somehow by then he came to believe that they were wrong or inadequate. True, there is the possibility that Mr. Ross knew that his answers when given were incomplete (as compared to incorrect), and that he simply could not think of the full answers. From our observations of Mr. Ross' command of the technology of the plant, we do not believe that this possibility on these particular questions is very likely.

There is also the possibility that Mr. Ross became aware that his answers were wrong when faced with the original NRC answer keys. In that event continued argument for the changes would be in bad faith. But we adhere to our belief that the company reviewers probably believed that their answers were correct and complete when they gave them during the "A" tests.

As to the first question, on its face we might have found that the seal-face/bearing-cooling differences were so clear that Mr. Ross' advocacy of that change was not totally forthright. However, as wrong as the answer proposed by him might seem to be now, the belief that it was complete and correct was then apparently shared by both of the other reviewers and six other candidates. Only eight candidates had the full correct answer; therefore most of those affected by the change believed that it was complete and correct. Moreover, the NRC examiner also believed the change was proper. It must be recalled that there was probably a sense of urgency during the review and what seems clear to us now may not have been so obvious then. This, we believe, may explain why the NRC examiner accepted the change. Thus, we cannot find that Mr. Ross knew at the time he urged the change, if he did urge it, that the change was wrong.

As noted above, we agree with Judge Milhollin's conclusions that the seal-face answer must have been covered during training. However, we do not agree with the inference drawn by him that the

interviewers were in bad faith when (according to Mr. Wilson) they argued that the seal-face answer had not been covered. Report at ¶ 155. If, in fact, the reviewers had remembered or known that the answer had been covered during training, they certainly would also have remembered or known that portion of the answer itself. Obviously they either had forgotten or never had known about the training. There is no evidence that Mr. Ross or the other reviewers acted in bad faith on the seal-face/bearing cooling question.

A similar analysis pertains to his putative unsuccessful attempt to change the primary pH answer key except that fewer agreed with his view. Still, several candidates did agree with him; and our own view of the proposed change convinces us that his position was not irrational. Thus good faith must be inferred.

Accordingly, as to Mr. Ross, we find to be unfounded all of the charges leveled against him personally. Consequently we do not impute any misconduct to the Licensee with respect to the answer-key episodes.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
METROPOLITAN EDISON COMPANY	)	Docket No. 50-289
(Three Mile Island Nuclear Station, Unit 1)	)	(Restart) (Reopened Proceeding)

COURTESY NOTIFICATION

This is intended solely as a courtesy and convenience to provide extra time to those notified. Official service will be separate from the courtesy notification and will be made by the Office of the Secretary of the Commission.

I hereby certify that I have today provided copies of the Board's MEMORANDUM AND ORDER REGARDING LICENSEE'S MOTION TO REOPEN THE RECORD, dated this date, to the persons designated (*) or (**) on the attached Mailing List.

Doris M. Moran
Clerk to the Atomic Safety
and Licensing Board

Bethesda, Maryland

May 5, 1982

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